

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1935

No. 6569

788

EARL S. WORSHAM AND UNITED STATES GUAR-
ANTEE COMPANY, A CORPORATION, APPEL-
LANTS,

vs.

BETHLEHEM STEEL COMPANY, A CORPORATION,
INTERVENER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED OCTOBER 9, 1935.

PRINTED NOVEMBER 14, 1935.

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1935.

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EARL S. WORSHAM AND UNITED STATES GUAR-
ANTEE COMPANY, A CORPORATION, APPEL-
LANTS,

vs.

BETHLEHEM STEEL COMPANY, A CORPORATION,
INTERVENER, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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United States Court of Appeals for the District of Columbia

No. 6569.

EARL S. WORSHAM ET AL., Appellants,

vs.

BETHLEHEM STEEL COMPANY, &c.

a Supreme Court of the District of Columbia.

At Law.

No. 82695.

UNITED STATES OF AMERICA, to the Use of WILLIAM G.
KERSHNER, Plaintiff,

vs.

EARL S. WORSHAM, an Individual Trading as WORSHAM
BROTHERS, and UNITED STATES GUARANTEE COMPANY, a
Corporation, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the
District of Columbia, at the City of Washington, in said
District, at the times hereinafter mentioned, the following
papers were filed and proceedings had, in the above-en-
titled cause, to wit:

1 In the Supreme Court of the District of Columbia.

At Law.

No. 82695.

UNITED STATES OF AMERICA, to the Use of WILLIAM G.
KERSHNER, Plaintiff,

v.

EARL S. WORSHAM, an Individual Trading as WORSHAM
BROTHERS, and UNITED STATES GUARANTEE COMPANY, a
Corporation.

*Intervening Petition of Bethlehem Steel Company, a
Corporation.*

Filed October 27, 1933.

Comes now Bethlehem Steel Company, a corporation,
and files this petition of intervention in the above entitled
action, and in accordance with the statute in such cases
made and provided, respectfully shows to the Court that
whereas, heretofore, to wit, on the 30th day of June, 1931,
the defendant Earl S. Worsham, an individual trading as
Worsham Brothers (hereinafter referred to as Worsham
Brothers) entered into a contract with the United States
of America by the terms of which contract the defendant
Worsham Brothers agreed to furnish all labor and mate-
rials and perform all work required for constructing cer-
tain public buildings, to wit, a barracks building and a
boiler plant at the Naval Air Station, Washington, District
of Columbia; that the said work thus contracted for was
and is a public work, and the United States of America
required the said Worsham Brothers to give the usual
penal bond with good and sufficient surety, with the obliga-
tion that the said Worsham Brothers should promptly make
payment to all persons supplying it with labor and mate-
rials in the prosecution of the work provided for in said
contract; and in accordance with and pursuant to the said
requirement and the statute in such cases made and
provided the said Worsham Brothers, as principal,
and the defendant United States Guarantee Com-
pany, a corporation, as surety, on, to wit, June 30, 1931,

did make, execute and deliver unto the United States of America their writing obligatory signed by them with their genuine signatures and sealed with their seals wherein they held and firmly bound themselves jointly and severally unto the United States of America in the sum of One Hundred Twenty-five Thousand Nine Hundred Thirty-three Dollars (\$125,933) and to which writing obligatory a condition was and is annexed as follows:

“Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.”

Thereafter, in order to carry out the terms and provisions of said contract with the United States, the defendant Worsham Brothers entered into a contract with Capital Fireproof Products Corporation, a corporation, of 1727 K Street, N. W., Washington, D. C., for the doing of certain construction work necessary to the fulfillment of said contract, the same being a part of the work contracted to be done thereunder.

Thereafter, this intervener did at the special instance and request of the said Capital Fireproof Products Corporation furnish to that said corporation iron and steel construction materials and supplies, as more fully set forth in the bill of particulars hereto attached and made a part hereof which are in all respects

correct and true. Said materials were furnished for use and were used in the construction of the said public work and the same were at the time they were contracted and delivered the reasonable values and were sold to said Capital Fireproof Products Corporation at the agreed amounts as set forth in said bill of particulars. After crediting against said amounts payments made by said Capital Fireproof Products Corporation there remained due and owing to this intervener, to wit, Four Thousand Four Hundred Dollars (\$4,400.00), which the said Capital Fireproof Products Corporation undertook and promised to pay to your intervener. Said materials and supplies supplied and furnished by this intervener to Capital Fireproof Products Corporation were used in the construction and completion of the said barracks building and boiler plant at the Naval Air Station, Washington, District of Columbia, under the original written contract as amended by Change Orders, A, of September 29, 1931, B, of November 2, 1931, C, D and E, of February 26, 1932, between the said Worsham Brothers and the United States of America, but notwithstanding which the said Capital Fireproof Products Corporation has not paid to this intervener the amount of \$4,400 so agreed to be paid by it to this intervener for the materials and supplies so sold and delivered. This intervener gave notice of default in the payment of said sum and made demand for the payment thereof from the defendant United States Guarantee Company in writing on, to wit, April 29, 1932, which notice came to the attention of the defendant Worsham Brothers, who acknowledged notice of default on the part of Capital Fireproof Products Corporation on, to wit, May 20, 1932, and further notice thereof and demand therefor was made on the defendant Worsham Brothers in writing on, to wit, May 24, 1932, and further notice thereof and demand therefor was made on defendant, United States Guarantee Company, and defendant Worsham Brothers on various other and sundry times.

Wherefore, there is justly due and owing to this intervener from the defendants Worsham Brothers and United States Guarantee Company the total sum of \$4,400, together with interest thereon. The defendants, Worsham Brothers and United States Guarantee Company, and each of them, have failed and still fail to pay the same, although many times requested so to do, and the same has

not been paid to the intervener on their behalf by any other individual or individuals, and this intervener claims of the defendants and each of them the sum of \$4,400 with interest at 6% per annum from October 10, 1931, until paid.

Said Worsham Brothers and United States of America accepted the said materials and supplies furnished by this intervener and used them in the construction of said barracks building and boiler plant at the Naval Air Station, Washington, District of Columbia, under said contract between said Worsham Brothers and the United States of America and in fulfillment thereof, and said materials furnished and supplied were necessary in the construction and completion of said work as required by the contract. The contract between the defendant Worsham Brothers and the United States of America was completed and final settlement had on, to wit, the 2nd day of November, 1932, which said final settlement was more than six months but less than one year before the filing of this action, and the intervening petition herein is filed within one year from the time of such settlement. No suit was brought by the United

5 States of America against said Worsham Brothers and/or said United States Guarantee Company during the first six months or at any time after said settlement.

By reason of the foregoing and by virtue of the statute in such cases made and provided an action has accrued to this intervener upon the bond aforesaid to have and demand of and from Worsham Brothers and the United States Guarantee Company, a corporation, and each of them the sum of Four Thousand Four Hundred Dollars (\$4,400.00) with interest at 6% per annum from the 10th day of October, 1931.

Wherefore, this intervener claims of the defendants and each of them the sum of Four Thousand Four Hundred Dollars (\$4,400.00), with interest at 6% per annum from the 10th day of October, 1931, until paid, besides costs of this suit.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
Attorneys for Intervener.

Receipt of and consent to service of two copies of the foregoing Intervening Petition, Affidavit of Merit and Bill

of Particulars is acknowledged this 27th day of October, 1933.

BYNUM E. HINTON,
H.

ALEXANDER M. HERON,
*Attorneys for defendants, Worsham
Brothers and United States Guar-
antee Company.*

Bill of Particulars.

* * * * *

Due and owing from the defendants, Worsham Brothers and United States Guarantee Company, and each of them, for materials and supplies furnished and supplied to Capital Fireproof Products Corporation at its request and at the prices hereinafter set forth, for use in construction of barracks and boiler plant at the Naval Air Station, Washington, District of Columbia, the payment for which was guaranteed and insured by the defendants and each of them by their joint and several undertaking dated, to-wit, June 30, 1931, as follows:

August 25, 1931, 68,810 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars)	\$1,161.74
August 25, 1931, 40,220 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars)	617.47
September 12, 1931, 49,990 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars)	810.46
September 30, 1931, 39,140 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars)	637.61
October 7, 1931, 44,960 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars)	730.09
October 9, 1931, 95,390 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars)	1,604.01
Total	<u>\$5,561.38</u>
Less payments received on account, the last payment being received December 12, 1932	1,161.38
Balance due and owing	<u>\$4,400.00</u>

Plus interest as 6% per annum on \$4,400.00 from October 10, 1931, until paid, and costs of this suit.

RICHARD H. WILMER,
DOUGLAS L. HATCH,
*Attorneys for Bethlehem Steel
Co., Intervening Petitioner.*

Affidavit of Merit.

* * * * *

STATE OF PENNSYLVANIA,
County of Northampton, ss:

B. F. Etter, being first duly sworn according to law, upon oath deposes and says that he is the Assistant Treasurer of the Bethlehem Steel Company, intervener herein; that he is authorized to make this affidavit on behalf of said corporation and has knowledge of the following facts, matters and things on which the intervening petition is based:

7 That on, to wit, the 30th day of June, 1931, the defendant Earl S. Worsham, an individual trading as Worsham Brothers (hereinafter referred to as Worsham Brothers) entered into a contract with the United States of America by the terms of which contract the defendant Worsham Brothers agreed to furnish all labor and materials and perform all work required for constructing certain public buildings, to wit, a barracks building and a boiler plant at the Naval Air Station, Washington, District of Columbia; that the said work thus contracted for was and is a public work, and the United States of America required the said Worsham Brothers to give the usual penal bond with good and sufficient surety, with the obligation that the said Worsham Brothers should promptly make payment to all persons supplying it with labor and materials in the prosecution of the work provided for in said contract; and in accordance with and pursuant to the said requirement and the statute in such cases made and provided the said Worsham Brothers, as principal, and the defendant United States Guarantee Company, a corporation, as surety, on, to wit, June 30, 1931, did make, execute and deliver unto the United States of America their writing obligatory signed by them with their genuine signatures and sealed with their seals wherein they held and firmly

bound themselves jointly and severally unto the United States of America in the sum of One Hundred Twenty-five Thousand Nine Hundred Thirty-three Dollars (\$125,933) and to which writing obligatory a condition was and is annexed as follows:

“Now therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter
8 be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.”

Thereafter, in order to carry out the terms and provisions of said contract with the United States, the defendant Worsham Brothers entered into a contract with Capital Fireproof Products Corporation, a corporation, of 1727 K Street, N. W., Washington, D. C., for the doing of certain construction work necessary to the fulfillment of said contract, the same being a part of the work contracted to be done thereunder.

Thereafter, this intervener did at the special instance and request of the said Capital Fireproof Products Corporation furnish to that said corporation iron and steel construction materials and supplies, as more fully set forth in the bill of particulars hereto attached and made a part hereof which are in all respects correct and true. Said materials were furnished for use and were used in the construction of the said public work and the same were at the time they were contracted and delivered the reasonable

values and were sold to said Capital Fireproof Products Corporation at the agreed amounts as set forth in said bill of particulars. After crediting against said amounts payments made by said Capital Fireproof Products Corporation there remained due and owing to this intervener, to wit, Four Thousand Four Hundred Dollars (\$4,400.00), which the said Capital Fireproof Products Corporation undertook and promised to pay to your intervener. Said materials and supplies supplied and furnished by this intervener to Capital Fireproof Products Corporation were used

9 in the construction and completion of the said barracks building and boiler plant at the Naval Air Station, Washington, District of Columbia, under the written contract as amended by Change Orders, A, of September 29, 1931, B, of November 2, 1931, C, D and E, of February 26, 1932, between the said Worsham Brothers and the United States of America, but notwithstanding which the said Capital Fireproof Products Corporation has not paid to this intervener the amount of \$4,400 so agreed to be paid by it to this intervener for the materials and supplies so sold and delivered. This intervener gave notice of default in the payment of said sum and made demand for the payment thereof from the defendant United States Guarantee Company in writting on, to wit, April 29, 1932, which notice came to the attention of the defendant Worsham Brothers, who acknowledged notice of default on the part of Capital Fireproof Products Corporation on, to wit, May 20, 1932, and further notice thereof and demand therefor was made on the defendant Worsham Brothers in writing on, to wit, May 24, 1932, and further notice thereof and demand therefor was made on defendant, United States Guarantee Company, and defendant Worsham Brothers on various other and sundry times.

Wherefore, there is justly due and owing to this intervener from the defendants Worsham Brothers and United States Guarantee Company the total sum of \$4,400, together with interest thereon. The defendants, Worsham Brothers and United States Guarantee Company, and each of them, have failed and still fail to pay the same, although many times requested so to do, and the same has not been paid to the intervener on their behalf by any other individual or individuals, and this intervener claims of the defendants

and each of them the sum of \$4,400 with interest at 6% per annum from October 10, 1931, until paid.

10 Said Worsham Brothers and United States of America accepted the said materials and supplies furnished by this intervener and used them in the construction of said barracks building and boiler plant at the Naval Air Station, Washington, District of Columbia, under said contract between said Worsham Brothers and the United States of America and in fulfillment thereof, and said materials furnished and supplied were necessary in the construction and completion of said work as required by the contract. The original contract between the defendant Worsham Brothers and the United States of America was completed and final settlement had on, to wit, the second day of November, 1932, which said final settlement was more than six months but less than one year before the filing of this action, and the intervening petition herein is filed within one year from the time of such settlement. No suit was brought by the United States of America in their own behalf against said Worsham Brothers and/or said United States Guarantee Company during the first six months or at any time after said settlement.

By reason of the foregoing and by virtue of the statute in such cases made and provided an action has accrued to this intervener upon the bond aforesaid to have and demand of and from Worsham Brothers and the United States Guarantee Company, a corporation, and each of them the sum of Four Thousand Four Hundred Dollars (\$4,400.00), with interest at 6% per annum from the 10th day of October, 1931, and there is justly due and owing from the defendants and each of them to this intervener, as set forth in said bill of particulars which is in all respects true and correct, the sum of Four Thousand Four Hundred Dollars (\$4,400.00), with interest at 6% per annum from the 10th day of October, 1931, exclusive of all set-offs and just grounds of defense, besides costs of this suit.

B. F. ETTER.

11 Subscribed and sworn to before me this 23rd day of October, 1933.

[SEAL.]

G. E. SELLERS,
Notary Public.

My commission expires Jan. 31, 1937.

Stipulation.

Filed October 27, 1933.

* * * * *

It hereby is stipulated by and between the attorneys for the intervening petitioner, Bethlehem Steel Company, and the defendants, Earl S. Worsham and United States Guarantee Company, that the defendants shall not be required to file a responsive pleading to the intervening petition of Bethlehem Steel Company filed herein October 27, 1933, except upon twenty (20) day-written notice from the attorneys for said intervening petitioner.

RICHARD H. WILMER,

DOUGLAS L. HATCH,

*Attorneys for Intervening Petitioner,**Bethlehem Steel Company.*

BYNUM E. HINTON,

H.,

ALEXANDER M. HERON,

*Attorneys for Defendants, Earl S. Worsham**and United States Guarantee Company.*

*Plea of Earl S. Worsham to Intervening Petition of
Bethlehem Steel Company, a Corporation.*

Filed April 30, 1935.

* * * * *

Comes now Earl S. Worsham and for a plea to the intervening petition of the Bethlehem Steel Company filed herein, says:

That in order to perform his contract with the United States of America, for the construction of a Barracks Building and Boiler Plant at the Naval Air Station, Washington, District of Columbia, mentioned in the intervening petition, he did enter into a contract with the Capital Fireproof Products Company for the doing of certain work and the furnishing of certain material required under the said contract with the United States; that he entered into the said contracts with the Capital

Fireproof Products Company upon the express representation of the Bethlehem Steel Company that the Capital Fireproof Products Company was a subsidiary corporation of the said Bethlehem Steel Company and was backed by the said Bethlehem Steel Company both financially and in its ability to execute the work agreed to be done by it; all of which said representations were untrue. Nevertheless, relying upon the said representations, this defendant entered into the said contract with the Capital Fireproof Company and thereafter paid the Capital Fireproof Products Company in full for all the work done and material furnished by it, which said payments were far in excess of \$4,400.00. Wherefore the said Bethlehem Steel Company is estopped to recover this claim of this defendant.

That the Capital Fireproof Products Company paid to Bethlehem Steel Company on account of the material purchased by it and used in the construction of the said Barracks Building and Boiler Plant at the Naval Air Station, Washington, D. C. the total sum of \$2,409.67, which said payments are set out in the bill of particulars hereto attached.

BYNUM E. HINTON,
H. WINSHIP WHEATLEY,
ALEXANDER M. HERON,
JULIAN B. HERON,
H.,

Attorneys for Defendant, Earl S. Worsham.

Affidavit of Defense.

* * * * *

STATE OF TENNESSEE,

County of Knox, ss:

Earl S. Worsham being first duly sworn on oath deposes and says that he is defendant in the foregoing cause; that he has a good defense to the same, which is that in order to perform his contract with the United States of America, for the construction of a Barracks Building and Boiler Plant at the Naval Air Station, Washington, District of Columbia, mentioned in the intervening petition, he did enter into a contract with the Capital Fireproof Products Company for the doing of certain work and the furnishing

of certain material required under the said contract with the United States; that he entered into the said contracts with the Capital Fireproof Products Company upon the express representation of the Bethlehem Steel Company that the Capital Fireproof Products Company was a subsidiary corporation of the said Bethlehem Steel Company and was backed by the said Bethlehem Steel Company both financially and in its ability to execute the work agreed to be done by it; all of which said representations were untrue. Nevertheless, relying upon the said representations, this defendant entered into the said contract with the Capital Fireproof Company and thereafter paid the Capital Fireproof Products Company in full for all the work done and material furnished by it, which said payments were far in excess of \$4,400.00. Wherefore the said Bethlehem Steel Company is estopped to recover this claim of this defendant.

That the Capital Fireproof Products Company paid to Bethlehem Steel Company on account of the material purchased by it and used in the construction of the said Barracks Building and Boiler Plant at the Naval Air Station, Washington, D. C. the total sum of \$2,409.67, which
 14 said payments are set out in the bill of particulars hereto attached.

EARL S. WORSHAM.

Subscribed and sworn to before me this 25th day of April, 1935.

KATHLEEN CARPENTER,
Notary Public.

Bill of Particulars.

* * * * *

Payments made by Capital Fireproof Products Company.

1931.	
Nov. 3	\$28.64
1932.	
Feb. 9	617.47
April 11	250.00
April 25	265.19
July 26	350.00

Payments made by Capital Fireproof Products Company.
—Continued.

1932.	
Sept. 20	500.00
Dec. 12	100.00
1934.	
Jan. 5	200.00

BYNUM E. HINTON,
H. WINSHIP WHEATLEY,
H.
ALEXANDER M. HERON,
JULIAN B. HERON,
H.

Attorneys for Defendant, Earl S. Worsham.

*Plea of the United States Guarantee Company to the
Intervening Petition of Bethlehem Steel Company, a
Corporation.*

Filed April 30, 1935.

* * * * *

Comes now the United States Guarantee Company, a corporation, and for a plea to the intervening petition of the Bethlehem Steel Company filed herein, says:

15 That the defendant, Earl S. Worsham, entered into a contract with the Capital Fireproof Products Company for the doing of certain work and the furnishing of certain material required under the contract which the said Worsham had entered into with the United States of America for the construction of a Barracks Building and Boiler Plant at the Naval Air Station, Washington, District of Columbia; that the said Bethlehem Steel Company did expressly represent to the said Worsham that the Capital Fireproof Products Company was a subsidiary corporation of the Bethlehem Steel Company and was backed by the said Bethlehem Steel Company both financially and in its ability to execute the work agreed to be done by it, all of which said representations were untrue. Nevertheless, relying upon said representations the said Worsham did enter into the contract above mentioned with the Capital Fireproof Products Company, and thereafter paid the Capital Fireproof Products Company in full for

all of the work done and material furnished by it, which said payments were far in excess of \$4,400.

Wherefore the said Bethlehem Steel Company is estopped to recover this claim from this defendant.

That the Capital Fireproof Products Company paid to the Bethlehem Steel Company on account of material purchased by it and used in the construction of the said Barracks Building and Boiler Plant at the Naval Air Station, Washington, D. C., the total sum of \$2,409.67, which said payments are set out in the bill of particulars hereto attached.

BYNUM E. HINTON,

H.

H. WINSHIP WHEATLEY,

H.

ALEXANDER M. HERON,

JULIAN B. HERON,

H.

Attorneys for Defendant, United States Guarantee Co.

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Affidavit.

* * * * *

DISTRICT OF COLUMBIA, ss:

Arthur B. Hayes, Jr., being first duly sworn, on oath deposes and says that he is an agent of the United States Guarantee Company, one of the defendants in the above entitled action, and is authorized to make this affidavit; that the defendant, Earl S. Worsham, entered into a contract with the Capital Fireproof Products Company for the doing of certain work and the furnishing of certain material required under the contract which the said Worsham had entered into with the United States of America for the construction of a Barracks Building and Boiler Plant at the Naval Air Station, Washington, District of Columbia; that the said Bethlehem Steel Company did expressly represent to the said Worsham that the Capital Fireproof Products Company was a subsidiary corporation of the Bethlehem Steel Company and was backed by the said Bethlehem Steel Company both financially and in its ability to execute the work agreed to be done by it, all of which said representations were untrue. Nevertheless, relying upon said representations the said Worsham did enter into the contract above mentioned with the Capital

Fireproof Products Company, and thereafter paid the Capital Fireproof Products Company in full for all of the work done and material furnished by it, which said payments were far in excess of \$4,400.

Wherefore the said Bethlehem Steel Company is estopped to recover this claim from this defendant.

That the Capital Fireproof Products Company paid to the Bethlehem Steel Company on account of material purchased by it and used in the construction of the said Barracks Building and Boiler Plant at the Naval Air Station, Washington, D. C., the total sum of \$2,409.67, which said payments are set out in the bill of particulars hereto
17 attached.

ARTHUR B. HAYES, JR.

Subscribed and sworn to before me this 30th day of April, 1935.

[SEAL.]

EDITH G. REEL,
Notary Public, D. C.

Bill of Particulars.

* * * * *

Payments made by Capital Fireproof Products Company.

1931.

Nov. 3	\$ 28.64
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1932.

Feb. 9	617.47
--------------	--------

April 11	250.00
----------------	--------

April 25	265.19
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July 26	350.00
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Sept. 20	500.00
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Dec. 12	100.00
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1934.

Jan. 5	200.00
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BYNUM E. HINTON,

H.

H. WINSHIP WHEATLEY,

H.

ALEXANDER M. HERON,

H. WINSHIP WHEATLEY, JR.,

H.

*Attorneys for Defendant, United
States Guarantee Co.*

Memorandum

May 27, 1935.—Findings of Court for Bethlehem Steel Company, Intervener, for \$4,017.00, and interest from May 1st, 1932, against defendants and costs. Wheat, C. J.

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Motion for New Trial.

Filed May 31, 1935.

* * * * *

Come now the defendants, Earl S. Worsham and United States Guarantee Company, a corporation, by their attorneys, Bynum E. Hinton and Alexander M. Heron, and move the Court for a new trial of the above entitled action, for the following reasons, to wit:

1. The finding of the Court is not supported by any evidence in the case.

2. The finding of the Court is contrary to law.

3. The Court erred in finding that the intervening petitioner, Bethlehem Steel Company, by its agent or salesman, did not induce the defendant, Earl S. Worsham, trading as Worsham Brothers, to enter into a contract with the Capital Fireproof Products Company.

4. The Court erred in finding that the defendant, Earl S. Worsham, trading as Worsham Brothers, did not rely on the false representations of the agent or salesman of the Bethlehem Steel Company in entering into his contract with the Capital Fireproof Products Company.

5. The Court erred in holding that the intervening petitioner, Bethlehem Steel Company, was not estopped to recover from the defendants because of the representations made by its agent or salesman which induced the defendant, Earl S. Worsham, trading as Worsham Brothers, to enter into his contract with the Capital Fireproof Products Company.

6. The Court erred in holding that the Bethlehem Steel Company had properly applied the sum of \$766.92 out of the payments of \$350.00 and \$500.00 made on or about July 26, 1932, and September 20, 1932, respectively, by the Capital Fireproof Products Company to the Bethlehem Steel Company, on the account of the two Virginia Postoffice jobs.

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7. The Court erred in holding that the defendants were not entitled to have the amount of \$766.92, above mentioned, applied to the account of the Worsham Brothers.

Wherefore the defendants pray that the Court set aside the finding entered herein upon the intervening petition of the Bethlehem Steel Company and grant the defendants a new trial.

May 31, 1935.

BYNUM E. HINTON,
ALEXANDER M. HERON,
Attorneys for Defendants.

Supreme Court of the District of Columbia.

Friday, June 14, 1935.

Session resumed pursuant to adjournment, Hon. Chief Justice Alfred A. Wheat, presiding.

* * * * *

Upon consideration of the motion filed herein, for a new trial, it is ordered that said motion be, and the same is hereby overruled, and judgment on the finding of the Court is ordered.

Wherefore, it is considered that Bethlehem Steel Company, Intervener herein, recover of the defendants the sum of Four Thousand Seventeen Dollars (\$4,017.00) with interest thereon from May 1, 1932, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment the defendants by their attorneys of record, in open Court, note an appeal to the United States Court of Appeals for the District of Columbia; whereupon, an undertaking to act as a supersedeas bond is hereby fixed in the sum of Five Thousand
20 Dollars (\$5,000.00) and a further undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memoranda.

July 1, 1935.—Supersedeas Undertaking (\$5,000) on appeal approved and filed.

July 3, 1935.—Order extending time to file Bill of Exceptions, to, and including July 9, 1935.

July 8, 1935.—Statement of Evidence on Equitable plea and Bill of Exceptions filed.

August 21, 1935.—Bill of Exceptions submitted.

Assignments of Error.

Filed August 26, 1935.

* * * * *

The Court erred:

1. In sustaining the intervener's objection to the question and answer "Had any notice been given to you on behalf of the Bethlehem"? To which question the witness would have answered "It had not." The defendants tendered a showing that by reason of the representations made by Bethlehem Steel Company's representative, Worsham did not inquire whether Capital Fireproof Products Corporation was paying Bethlehem Steel Company.

2. In not sustaining the defendant's motion for judgment on the equitable plea.

3. In finding that the defendant Worsham was not induced to enter into his contract with the Capital Fireproof Products Corporation by reason of the false representations of agent or representative of the Bethlehem Steel Company.

4. In finding that the Bethlehem Steel Company was not estopped to recover in this proceeding because of the statements made by the agent or representative of the Bethlehem Steel Company.

5. In finding that the statements made by the agent or representative of the Bethlehem Steel Company did not constitute the basis of an equitable estoppel.

6. In not sustaining defendant's motion for judgment under the law plea as to the amount of \$766.92.

7. In finding that the intervener, Bethlehem Steel Company, had properly applied the amount of \$766.92 to the balance due for labor and materials used in the West Point and Manassas, Virginia, post office jobs, instead of apply-

ing said amount to the balance due for labor and materials used in the Naval Air Station job, said balance being first in priority of time.

8. In overruling defendant's motion for a new trial.

9. In other respects appearing of record.

BYNUM E. HINTON,

ALEXANDER M. HERON,

Attorneys for Defendants.

22 *Findings of Fact and Conclusions of Law.*

On the Equitable issue raised on the Plea of Defendants Worsham and United States Guarantee Company to the Petition of Bethlehem Steel Company.

Filed September 10, 1935.

* * * * *

Findings of Fact.

The Court makes and files the following findings of fact:

At the time of negotiations between Earl S. Worsham, the principal contractor with the Government for the erection of certain buildings at the Naval Air Station in the District of Columbia, and Capital Fireproof Products Corporation for the supplying by the latter of fabricated reinforcing steel to the former for use in the construction of the Naval Air Station job, a conference was held at which a salesman for Bethlehem Steel Company was present. Said salesman stated in effect to Worsham that if Capital Fireproof Products Corporation was given the contract by Worsham for the supplying of the fabricated reinforcing steel Bethlehem Steel Company would supply the necessary raw steel to Capital Fireproof Products Corporation for use by it in fulfilling such contract with Worsham. The contract for delivery of the reinforcing steel was made by Worsham with Capital Fireproof Products Corporation. The steel was delivered to Capital Fireproof Products Corporation by Bethlehem Steel Company and by Capital Fireproof Products Corporation fabricated and delivered to the job in complete conformity with the contract between Worsham and Capital Fireproof Products Corporation. No representation was made by the salesman for Bethlehem Steel Company that Bethlehem Steel Company was back of Capital Fireproof Products Corporation, that the latter corporation was a subsidiary of Bethlehem Steel Company

23 or that Bethlehem Steel Company backed Capital Fireproof Products Corporation either financially or in its ability to perform the contract. The cost of the raw material to be fabricated constituted from 60% to 70% of the total price under Worsham's contract with Capital Fireproof Products Corporation for the supplying of the reinforcing steel on the job. Capital Fireproof Products Corporation had never done business before with Worsham. The use of fabricated steel by Worsham came at a time early in the performance of his principal contract with the Government. The statements made by the salesman for Bethlehem Steel Company at most went only to the proposition that if the contract were given to Capital Fireproof Products Corporation by Worsham the former could obtain the necessary material from Bethlehem Steel Company for fabrication under its contract with Worsham.

ALFRED A. WHEAT,
Chief Justice.

Conclusions of Law.

The conclusions of law of the Court on the equitable issues herein are as follows:

It is found that Bethlehem Steel Company because of the statements made by its salesman to Worsham is not estopped to assert its right to payment under the bond. The statements made do not constitute the basis of an equitable estoppel, and even if they did no authority in the salesman to bind Bethlehem Steel Company was shown.

ALFRED A. WHEAT,
Chief Justice.

24 *Findings of Fact and Conclusions of Law.*

On the Legal issue raised on the Plea of Defendants Worsham and United States Guarantee Company involving the proper application of the payment of \$766.92.

Filed September 10, 1935.

* * * * *

Findings of Fact.

The Court adopts the stipulation of facts submitted by counsel as the facts governing the disposition of the ques-

tion raised by the plea as to the application of the payment of \$766.92 made by Capital Fireproof Products Corporation to Bethlehem Steel Company.

ALFRED A. WHEAT,
Chief Justice.

Conclusions of Law.

The Court concludes that the Bethlehem Steel Company is entitled to a judgment in effect treating the payment of \$766.92 made by Capital Fireproof Products Corporation to it as a payment on account of materials supplied by Bethlehem Steel Company to Capital Fireproof Products Corporation for use in the construction of the post offices at Manassas and West Point, Virginia.

ALFRED A. WHEAT,
Chief Justice.

Supreme Court of the District of Columbia.

Tuesday, September 10, 1935.

Session resumed pursuant to adjournment, Hon. Chief Justice Alfred A. Wheat, presiding.

* * * * *

Come now the parties hereto by their respective attorneys of record, and thereupon, the defendants by
25 their attorneys present to the Court their Statement of Evidence and Bill of Exceptions, taken at the trial of this cause, and heretofore submitted herein, and pray that the same be signed and made of record, *nunc pro tunc*, which is hereby accordingly done.

Designation of Record.

Filed July 12, 1935.

* * * * *

To the Honorable Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia:

Please prepare transcript of record on appeal to the Court of Appeals in the above entitled cause to include the following:

1. Intervening petition of Bethlehem Steel Company and stipulation as to pleading. Plea of defendant Worsham to intervening petition of Bethlehem Steel Company, affidavit and bill of particulars. Plea of defendant United States Guarantee Company to intervening petition of Bethlehem Steel Company, affidavit and bill of particulars.

2. Memorandum of finding of court, motion for new trial and overruled, judgment and notation of appeal.

3. Findings of fact and conclusions of law.

4. Memo of filing and approval of supersedeas appeal bond.

5. Memo of extension of time for submission of statement of evidence and bill of exceptions, and submission thereof within time.

6. Assignments of error.

7. Bill of exceptions and statement of evidence.

26 8. This designation.

BYNUM E. HINTON,
H. WINSHIP WHEATLEY,
ALEXANDER M. HERON,
JULIAN B. HERON,

Attorneys for Defendants.

Service of a copy of the foregoing Designation of Record is acknowledged this 12th day of July, 1935.

RICHARD H. WILMER,
DOUGLAS L. HATCH,

Attorneys for Bethlehem Steel Company, Intervener.

27 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 26, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 82695 at Law, wherein United States of America, to the use of William G. Kershner, is Plaintiff and Earl S. Worsham, an individual trading as Worsham Brothers, and United States Guarantee Company, a corporation, are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 7th day of October, 1935.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. D. COFLIN,
Assistant Clerk.

28 Submitted August 21, 1935, Jesse C. Adkins, Presiding Justice.

In the Supreme Court of the District of Columbia.

At Law. No. 82695.

UNITED STATES OF AMERICA, to the Use of WILLIAM
G. KERSHNER, Plaintiff,

vs.

EARL S. WORSHAM, an Individual Trading as WORSHAM
BROTHERS, and

UNITED STATES GUARANTEE COMPANY, a Corporation,
Defendants.

Statement of Evidence and Bill of Exceptions.

Be it remembered that at the trial of this case, all other matters having been finally disposed of, the intervening petition of the Bethlehem Steel Company, a corporation, came on to be heard on the pleas of the defendants Earl S. Worsham, an individual trading as Worsham Brothers, and United States Guarantee Company, before Mr. Chief Justice Wheat, on May 27, 1935, and it was agreed by counsel for the respective parties that the equitable plea should first be heard by the court and if there then remained an issue of law then that issue should also be heard by the court, trial by jury being expressly waived with the consent of the court at the trial table.

Equitable Issue.

Thereupon **Earl Swift Worsham**, a defendant herein, being first duly sworn, testified on his own behalf and on be-

half of the United States Guarantee Company on direct examination in substance as follows:

That his contract with the United States for the erection of certain buildings at the Naval Air Station, Anacostia, in the District of Columbia, required the use of reinforcing steel; that bids were asked for and were submitted by the Knoxville Iron Company and the Capital Fireproof Products Corporation. The bid of the Capital Fireproof Products Corporation was in excess of \$10,000.00 and the bid of the Knoxville Iron Company just slightly above \$9,000.00. A conversation was had with a Mr. Thompson, representing the Capital Fireproof Products Corporation, by telephone, about the time he was awarded the contract, and at a later time by telephone at his hotel in Washington. A conversation was had with Mr. Thompson in person in the presence of a Mr. Coster of the Bethlehem Steel Company at his room in the Willard Hotel ten days after the award of the contract, whereupon the following occurred:

“Q. Suppose you tell us, Mr. Worsham, what was said to you, there, by Mr. Coster.

“A. Mr. Thompson reached me on the telephone, and said that he wanted to come over and talk to me about selling me the steel on the Anacostia work. And I told him that I was not interested, because his price was out of line.

“And he said, ‘I have a representative of the Bethlehem Steel Company, and something that you would be interested in.’

“And he brought Mr. Coster, and came in the room and introduced Mr. Coster, and stated that he was connected with the Bethlehem Steel Company.

“And my conversation practically entirely was with Mr. Coster.

“And he led me to believe that I was dealing with the Bethlehem Steel Company.

“When I made the statement that I had to have the material and had to have it quick, and I had a lower bid than theirs and I did not see where I could do any business with them, then he said: ‘Well, if we make our price right, will you be interested?’

“I said, ‘Well, I have been buying steel from the Knoxville Iron Company. And they have just finished my fifth building, down here; and I am satisfied with them.’

“And he said: ‘Are they as big as the Bethlehem Steel Company? Do you think they can give the service
30 that the Bethlehem Steel Company can?’

“I said: ‘Well, that sounds more interesting.’

“So he said: ‘All right; will \$1,000 get the business?’

“I said: ‘Well, it will mighty near get it.’

“He said: ‘Well, will you give us the business at \$1,000 off of our bid?’

“I said: ‘Providing you will make delivery and can assure me you can make delivery.’

“He said: ‘The Bethlehem Steel Company is behind this, and I can assure you we will make delivery.’

“I said: ‘All right; I will give you the order.’ ”

The contract price was between \$9,000 and \$9,200. The order was given direct to the Capital Fireproof Products Corporation. Payment was made in full at the time of the completion of the work under the principal contract. Witness was then asked: “Had any notice been given to you on behalf of the Bethlehem?” “A. It had not.” Objection was made to this question and answer by the attorney for the Bethlehem Steel Company, on the ground that notice was not an issue raised by the plea and there was no requirement under the Hurd Act or the provisions of the bond that materialmen notify of non-payment in order to invoke the relief under the bond, and the objection was sustained. An exception was taken by defendants’ counsel and allowed, it first being argued that relying on the Bethlehem Steel Company’s alleged representations defendant paid the Capital Fireproof Products Corporation and did not protect themselves as they would have done had it not been for the alleged representations of the Bethlehem Steel Company.

On cross-examination defendant testified that he had at least two conversations with a Mr. Thompson of the Capital Fireproof Products Corporation and one with a Mr. Coster referred to as representing the Bethlehem Steel Company and no other persons were present at such conferences. Witness testified that the Capital Fire-
31 proof Products Corporation delivered the steel under its contract with Worsham Brothers to the job. On re-direct examination witness testified in substance that in conference with Thompson and Coster he told Thompson

that he would accept the bid of the Capital Fireproof Products Corporation and for them to get busy and get on the details of the job.

On recross-examination witness testified in substance that he made his contract with Thompson representing the Capital Fireproof Products Corporation.

And thereupon the intervening petitioner, Bethlehem Steel Company, to sustain the issues on its part joined, called as a witness **Bryon C. Thompson**, who being first duly sworn testified on direct examination in substance as follows:

That in the spring or early summer of 1931 he was Treasurer and Sales Manager of the Capital Fireproof Products Corporation and in that capacity called on the defendant Earl S. Worsham with regard to securing the contract for the reinforcing steel on the Naval Air Station Barracks, at which time he was given the impression that he was the low bidder and that Mr. Worsham would like to give him the business inasmuch as his shop was in town and able to give quick delivery. Worsham told him he wanted to investigate and check up to see if the Capital Fireproof Products Corporation was able to furnish the material and he would see him at a later date. The second time he saw Worsham was at Worsham's room in the Willard Hotel, which he visited accompanied by a Mr. Coster, a salesman out of the Baltimore office of the Bethlehem Steel Company. Negotiations were had at this meeting and the Capital Fireproof Products Corporation was promised the contract. That neither he nor Coster stated that the Capital Fireproof Products Corporation was a subsidiary of the Bethlehem Steel Company or that the Bethlehem Steel Company was back of the Capital Fireproof Products Corporation
32 financially, or that it would guarantee the performance of the contract. Worsham wanted to know if the Capital Fireproof Products Corporation would be able to supply the steel on the job when it was needed and whether it was in a position to get the steel from the mill, and Coster told Worsham that if Capital Fireproof Products Corporation got the contract Bethlehem Steel Company would ship the material to Capital so that Capital could deliver it to the job. The witness stated that he had had twelve years' experience in the fabricating business.

That fabricating consisted of shaping stock lengths of reinforcing bars secured from the mill into various sizes and shapes according to the details of drawings, so that they will be ready to put in the floor in forms and concrete poured around them. On this contract raw material cost 60 to 70 per cent of the contract price or from five to six thousand dollars. The witness further testified that Worsham told him that Capital Fireproof Products Corporation was low bidder on the job and that Worsham never told him his bid was out of line. Witness stated that a special estimate had been made on the job to effect a saving so that a price could be made that would be lower than competitors.

On cross-examination witness testified that the only discussion at the second conference was that the bid of the Capital Fireproof Products Corporation was in line and that Worsham would like to give them the contract. Witness did not remember whether the bid was reduced at the second conference, but stated it might have been. The material used in this job was received from the Bethlehem Steel Company and definitely identified for this particular job. Witness did not recall whether he ever knew what the bid of the Knoxville Iron Works was. Witness did not remember how long the conversation at the Willard Hotel lasted. Witness testified that Worsham wanted to be sure that Capital was able to secure material and have it in its

shop so that when he called for it on the job in truck
33 load lots Capital had the material to deliver to him.

Worsham had never done business with the Capital Fireproof Products Corporation before. On redirect examination the witness testified that steel and concrete were the first materials put into this project and that it is customary to take a mill representative to call on a contractor after the job has been allowed. The witness was then asked: "Did Mr. Worsham ever approach you in an endeavor to get you to testify in this case that the steel which was supplied by Bethlehem did not go into this job?"; to which he responded: "Mr. Worsham has called on me * * * regarding that matter."

Thereupon **Joseph B. Coster** was produced and sworn on behalf of the intervening petitioner, Bethlehem Steel Company, and testified on direct examination in substance as follows:

He was a salesman for the Bethlehem Steel Company and in the late spring and early summer of 1931 had occasion to confer with the defendant Earl S. Worsham and Mr. Thompson of the Capital Fireproof Products Corporation concerning the letting of contract to Thompson's Company. He accompanied Thompson to that conference and told Worsham that should the Capital Fireproof Products Corporation be awarded the contract, Bethlehem Steel Company would supply to Capital Fireproof Products Corporation the necessary steel to fulfill the contract. Witness did not at any time state to Worsham that Capital Fireproof Products Corporation was a subsidiary of the Bethlehem Steel Company or that the Capital Fireproof Products Corporation was financially backed by the Bethlehem Steel Company or that the Bethlehem Steel Company guaranteed or was back of the performance of the contract by Capital Fireproof Products Corporation. There was no price discussion at this conference. There was no decision made by Worsham at this conference. The conference lasted about twenty minutes. He never used the expression

34 "If you give us the job" or "If you give us the contract." Bethlehem Steel Company made deliveries to the Capital Fireproof Products Corporation and there were no complaints concerning possible delay in the delivery of the material. On cross-examination the witness testified in substance as follows:

The entire amount of the steel on this job was furnished by the Bethlehem Steel Company to the Capital Fireproof Products Corporation. Witness did not recall discussing any other bids but may have remarked that the Bethlehem Steel Company was a great deal larger than the Knoxville Iron Works. He did not assure Worsham that the material would be furnished by the Bethlehem Steel Company and delivered on the job. He told Worsham that the Bethlehem Steel Company would furnish the material to the Capital Fireproof Products Corporation. The purpose of the visit to Worsham was "to get an order for Thompson, to get an order for the Bethlehem Steel Company." Worsham made no statement at the conference that would lead him to believe that he was in any way concerned with the credit or financial stability of Capital Fireproof Products Corporation.

Law Issue.

Thereupon there was introduced in evidence and filed as a part of the record a stipulation of facts agreed to by counsel, which stipulation set forth in substance that the Bethlehem Steel Company supplied certain materials to the Capital Fireproof Products Company which were used in construction of the work, as follows:

August 25, 1931, 68,810 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars).....	\$1,161.74
August 25, 1931, 40,220 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars).....	617.47
September 12, 1931, 49,990 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars)...	810.46
September 30, 1931, 39,140 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars)...	637.61
October 7, 1931, 44,960 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars).....	730.09
Forwarded	\$3,957.37
35 Forwarded	\$3,957.37
October 9, 1931, 95,390 lbs. Open Hearth Reinforcing Bars (Deformed Concrete Bars)	1,604.01
Total	\$5,561.38

In addition to the foregoing materials, on September 17, 1931, the Bethlehem Steel Company supplied materials to the Capital Fireproof Products Corporation in the amount of \$766.92. These materials were used in the construction of postoffice buildings at Manassas and West Point, Virginia. The contractor with the United States for these two postoffices was Algernon Blair, who, together with the United States Guarantee Company as surety, gave bonds to the United States conditioned for the payment to all persons furnishing labor and materials to these works, in accordance with the requirements of the Hurd Act. Final settlement of the West Point, Virginia, contract was made on August 18, 1932, and of the Manassas, Virginia, contract on April 23, 1932.

Thereafter, on November 3, 1931, a credit of \$28.64 was allowed to the Capital Fireproof Products Corporation for materials returned.

On February 6, 1932, the Capital Fireproof Company remitted to the Bethlehem Steel Company \$617.47 to credit the smaller invoice of August 25. This payment was acknowledged by the Bethlehem Steel Company in writing to cover the designated invoice and further requesting a substantial payment prior to the 15th of February 1932, stating that the Bethlehem Steel Company was very anxious to have the past due part of this account, which was the entire account, paid off if possible during February.

On April 9, 1932, the Capital Fireproof Products Corporation remitted \$250.00 to the Bethlehem Steel Company "to apply on our account", with a promise of making another substantial reduction "of this account" in the latter part of April.

On April 12, 1932, this payment was acknowledged
36 by the Bethlehem Steel Company to the Capital Fireproof Company "to apply on your account", with the further advice that unless the promised payment would go a long way toward cleaning up "the account" the Bethlehem Steel Company would have to take the necessary steps to force payment.

On April 23, 1932, the Fireproof Products Company remitted \$265.19 "to apply on our account" with a promise of a more substantial payment about the 15th of May, and expressing hope of being able to make collections which would enable them to do better "in respect to your account."

Bethlehem Steel Company acknowledged this \$265.19 "to apply on your account" on April 25, and advised that this brought the balance down to \$5350.00, and further that it was very important "that this account" be reduced and cleaned up as soon as possible, and that they were counting on a further payment "on the account" to reach them before the end of the week.

On July 25, 1932, the Capital Fireproof Products Corporation remitted \$350.00 to the Bethlehem Steel Company, in accordance with a recent conversation at the Willard Hotel, with the promise to mail a payment each month "against our account" in as large an amount as possible, together with an offer to give a note for the balance and make a reasonable curtailment each month.

This payment was acknowledged by letter of July 28, and in reply to the proposal to pay something on account each month, the Bethlehem Steel Company advised that it

would depend upon how much the Capital Fireproof Company could pay around the 15th of August, as to whether they would let "the account" run along or take the action mentioned in a recent conversation.

On September 13, 1932, the Capital Fireproof Products Corporation remitted \$500.00 as the August payment mentioned in their conversation.

37 On September 15 the Bethlehem Steel Company acknowledged the payment of \$500.00, together with the advice that an additional payment of \$500.00 "to apply on your account" would be in our hands before the end of the month. The wish was expressed by the Bethlehem Company that at least half of the remaining balance be paid during October.

On July 18, 1933, the Bethlehem Steel Company wrote calling attention "to our account" to give the Capital Fireproof Products Company an opportunity to make payment rather than to send "the account to an attorney's hands with the resulting complications with the bonding company".

On December 12, 1932, \$100.00 was paid in hand to a representative of the Bethlehem Steel Company by Capital Fireproof Products Corporation.

On January 5, 1934, \$200.00 was paid by Capital Fireproof Products Corporation to Bethlehem Steel Company on account of materials used in the construction of the Naval Air Station.

There were transmitted from the Bethlehem Steel Company to the Capital Fireproof Products Corporation the two following statements on or about the dates appearing upon them:

Monthly Statement.

Original. Bethlehem, Pa., June 30, 1932.

In account with Bethlehem Steel Company.

Capital Fireproof Products Corp., 1727 "K" Street,
Washington, D. C.

Aug. 26	1	.....	1,161.74
Sep. 14	1	.....	810.46
Sep. 17	1	.....	766.92
Sep. 30	1	.....	820.61

Monthly Statement—Continued.

	Oct.	7	1	.....	730.09	
	Oct.	10	1	.....	1,604.01	
					5,893.83	
38	Nov.	3	SC	.....	28.64	Cr.
	Apr.	11	CS	.....	250.00	Cr.
	Apr.	25	CS	.....	265.19	Cr.
					543.83	Cr.
					5,350.00	

Monthly Statement.

Original. Bethlehem, Pa., August 31, 1933.

In account with Bethlehem Steel Company.

Capital Fireproof Products Corp., 1727 "K" Street,
Washington, D. C.

1931.

Aug.	26	1	.....	1,161.74
Sep.	14	1	.....	810.46
Sep.	17	1	.....	766.92
Sep.	30	1	.....	820.61
Oct.	7	1	.....	730.09
Oct.	10.	1	.....	1,604.01
				5,893.83

1931.

Nov.	3	SC		28.64	Cr.
------	---	----	-------	-------	-----

1932.

Apr.	11	CS	.....	250.00	Cr.
Apr.	25	CS	.....	265.19	Cr.
Jul.	26	CS	.....	350.00	Cr.
Sep.	20	CS	.....	500.00	Cr.
Dec.	12	CS	.....	100.00	Cr.
				1,493.83	Cr.
				4,400.00	

The stipulation further provides as follows:

“That if called, the proper official of Bethlehem Steel Company would testify as follows: That with respect to the payments of \$350 made on or about July 26, 1932 and \$500 made on or about September 20, 1932, these payments were received by Bethlehem but inasmuch as they were not in payment of a specific invoice or a specific amount, they were merely run into the Capital Fireproof Products account; that after receipt of the payments the question as to the rights of Bethlehem under the three bonds; i. e., public bond on the Manassas, Virginia, post office, the public bond on the West Point, Virginia, post office and the public bond on account of the Naval Air Station job, was considered by Bethlehem. It was concluded that inasmuch as no designation was made as to the application of these two payments by Capital Fireproof Products, they would be applied to the payment of the amount of \$766.92, this amount covering the materials supplied on account of the two Virginia post office jobs; that thereupon a check mark was placed on the ledger beside the debit item. This was a different type of notation than is usually made by the bookkeeping department. Generally when an invoice is listed as a debit on the account, it is given a number and then when a payment comes in in payment of that particular item, it is likewise numbered with the same number. The amount of \$850 was applied against the amount of \$766.92 by Bethlehem some time between September 20, 1932 and December 7, 1932, and probably near December 7, 1932.”

Thereupon the plaintiff and defendant rested.

Whereupon, the foregoing being the substance of all the testimony and evidence concerning this case, counsel for defendants made a motion under the equitable plea for a judgment on the ground that the defendant, Earl S. Worsham, was induced to enter into his contract with the Capital Fireproof Products Corporation by reason of the false representations made by an agent or representative of the Bethlehem Steel Company, which motion was overruled by the Court and an exception noted and allowed.

Whereupon defendants made a motion under the law plea for a judgment as to the amount of \$766.92, on the ground that since the Bethlehem Steel Company failed to make an application of the payments of \$350 and \$500 when

received and which the Capital Fireproof Products Corporation transmitted to the Bethlehem Steel Company on July 25, 1932, and September 20, 1932, respectively, they should have been applied to extinguish the balance
40 due for materials furnished the Capital Fireproof Products Corporation and used in the construction of the Naval Air Station, said balance being the first in priority of time, instead of the sum of \$766.92 being thereafter deducted from said payments and applied on the balance due for materials furnished for use at Manassas, Virginia, and West Point, Virginia, which motion was overruled by the Court and an exception noted and allowed. And thereupon, and as all of said exceptions were duly noted and allowed, as aforesaid, and were duly entered upon the minutes of the Court before the Court entered its finding, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the defendants may have their case reviewed on appeal, the defendants, by their attorneys, move the Court to sign this their statement of evidence and bill of exceptions to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is granted by the Court, and thereupon defendants tender this their statement of evidence and bill of exceptions and request the Court to approve, sign and seal the same, which is accordingly done now for them, this 10th day of September, 1935.

ALFRED A. WHEAT,
Chief Justice.

Endorsed on cover: District of Columbia Supreme Court. No. 6569. Earl S. Worsham et al. Appellants vs. Bethlehem Steel Company &c. United States Court of Appeals for the District of Columbia. Filed Oct. 9, 1935. Henry W. Hodges, Clerk.

(7042-C)

FILED DEC 14 1935

Healy & Son

IN THE
**United States Court of Appeals
for the District of Columbia**

—
No. 6569
—

EARL S. WORSHAM AND UNITED STATES GUARANTEE
COMPANY, a corporation, *Appellants*,
v.
BETHLEHEM STEEL COMPANY, a corporation, intervener,
Appellee.

—
BRIEF OF APPELLANTS
—

BYNUM E. HINTON,
ALEXANDER M. HERON,
JULIAN B. HERON,
Attorneys for Appellants.

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IN THE

**United States Court of Appeals
for the District of Columbia**

No. 6569

EARL S. WORSHAM AND UNITED STATES GUARANTEE
COMPANY, a corporation, *Appellants*,

v.

BETHLEHEM STEEL COMPANY, a corporation, intervener,
Appellee.

BRIEF OF APPELLANTS

STATEMENT OF FACTS

This action arises out of the furnishing of materials for use in the construction of public buildings for the United States at the Naval Air Station, Washington, District of Columbia.

On the 30th day of June, 1931, the appellant, Earl S. Worsham, trading as Worsham Brothers, entered into a contract with the United States for the construction of the above mentioned buildings and gave the bond required by law, Title 40, U. S. C. A. 270, conditioned for the performance of the contract, and

further conditioned for the prompt payment to all persons supplying labor and materials in the prosecution of the work. The appellant, United States Guarantee Company, was surety on the bond.

Thereafter, in order to carry out the terms and provisions of the contract, appellant Worsham, relying on the express representations and statements of the appellee, Bethlehem Steel Company, made in the presence of the President of the Capital Fireproof Products Corporation, that Bethlehem Steel Company backed Capital Fireproof Products Corporation both financially and in its ability to do the work, entered into a contract with said Capital Fireproof Products Corporation for the furnishing of iron and steel construction materials and supplies for use and which were furnished and used in the construction of the work required (R. 25, 26). The appellant Worsham paid to the Capital Fireproof Products Corporation the full amount due for the materials and supplies (R. 26). The Capital Fireproof Products Corporation had purchased these materials from the appellee, Bethlehem Steel Company, for the total sum of \$5,561.38, and paid on account thereof only the sum of \$2,311.36 (R. 27, 28, 30, 31, 32). Appellants under their plea claim that the appellee is estopped from asserting any right under the terms and provisions of the bond above mentioned for the balance due by reason of its having made the false and fraudulent representations which induced the appellant Worsham to enter into his contract with the Capital Fireproof Products Corporation. The appellants' counsel sought to examine the witness Earl S. Worsham on the question of notice by the Bethlehem Steel Company to the appellants of the failure of the Capital Fireproof Products Corporation to pay it for said materials, but was prevented from so doing upon objec-

tion of appellee's counsel (R. 26). A motion for judgment in favor of the appellants on the ground that the appellant Worsham was induced to enter into his contract with the Capital Fireproof Products Corporation by reason of said false and fraudulent representations of the appellee, was denied by the court (R. 34), the court having first found that no representations were made by appellee that appellee was back of Capital Fireproof Products Corporation, or that Capital Fireproof Products Corporation was a subsidiary of appellee or appellee backed Capital Fireproof Products Corporation either financially or in its ability to perform the contract.

A stipulation of facts under the law issue raised by a plea of partial payment was then introduced into evidence (R. 30, 31, 32, 33, 34). This stipulation shows that between August 25, 1931, and October 9, 1931, there was purchased by Capital Fireproof Products Corporation from appellee materials in the amount of \$5,561.38 for use in the Naval Air Station project and also that materials in the amount of \$766.92 were purchased September 17, 1931, by Capital Fireproof Products Corporation from appellee for use in the construction of the postoffice buildings at Manassas and West Point, Virginia. The contractor with the United States for these postoffices was Algernon Blair and the surety on his bond conditioned for the payment of labor and materialmen in accordance with the requirements of the Heard Act was the appellant, United States Guarantee Company. At the time of the purchase of materials on September 17, 1931, for use at Manassas and West Point, Virginia, there was a balance due for materials furnished for use in the Naval Air Station project of \$2,699.67 (R. 30). There was a balance due for said materials on July 25, 1932, when the amount of

\$350.00 was paid by Capital Fireproof Products Corporation to the appellee, of \$1,538.37 (R. 30, 31). Assuming that the aforesaid sum of \$350.00 was applied to this balance, there was a balance due on September 13, 1932, at the time of the payment of \$500.00 by Capital Fireproof Products Corporation, to appellee, in the amount of \$1,188.37. Payments of \$350.00 and \$500.00, respectively, were acknowledged by the appellee and placed in the Capital Fireproof Products Corporation account. The creditor did not specify the particular account to which they were to be applied and they were not applied to any particular account by the Bethlehem Steel Company (R. 34). Some time thereafter, between the 20th of September, 1932, and the 7th of December, 1932, and probably nearer the 7th of December, 1932, a check-mark was placed opposite these items by appellee, it being represented that it was its intention to deduct the sum of \$766.92 from said payments and apply the same to the account of the creditor for materials furnished for use and used in the construction of the postoffice buildings at Manassas and West Point, Virginia. The check-mark used was a different type of notation than generally used. No actual application of these amounts was made. Appellants moved for judgment as to the amount of \$766.92 on the ground that as the debtor and the creditor had not made an application of the payments of \$350.00 and \$500.00, that they should be applied to the debt having priority in time, since each debt was equally secured, but the court overruled said motion and gave judgment for the appellee (R. 34, 35).

THE ERRORS PRESENTED FOR REVIEW ARE:

- (1) The sustaining of intervenor's objection to the question and answer: "Had any notice been

given to you on behalf of the Bethlehem"; to which question the witness would have answered: "It had not."

(2) The overruling of defendants' motion for judgment under the equitable plea.

(3) The overruling of defendants' motion for judgment under the law plea as to the amount of \$766.92.

ARGUMENT

I. ESTOPPEL

The trial court erred in not allowing appellants' counsel to question the witness Earl S. Worsham as to whether he had ever received notice from the appellee of the failure of the Capital Fireproof Products Corporation to pay it for materials supplied. The witness was asked: "Had any notice been given to you on behalf of the Bethlehem?" The witness answered: "It had not." An objection was made to this question and answer by the attorney for the appellee on the ground that notice was not an issue raised by the plea and there was no requirement under the Heard Act or the provisions of the bond that materialmen notify of non-payment in order to invoke the relief under the bond, and the court sustained the objection (R. 26). It was urged by appellants' counsel that the failure to give notice prevented appellants from protecting their rights in the premises and they made no efforts to protect themselves because of the said representations. Appellants' counsel contend that if they were allowed to have this question and answer stand and to further interrogate the witness on the subject of notice, they would then have been in a position to argue that the failure to give notice supported the statements and representations made by the appellee to the effect that it backed

Capital Fireproof Products Corporation financially, as well as in its ability to do the work. In other words, this would have tended to show that appellee was behind the Capital Fireproof Products Corporation on this contract and treated it as its agent or representative and therefore never notified the appellants of its failure to pay until the time arrived when appellee believed it possible it would not collect from the Capital Fireproof Products Corporation. It is not to be believed that appellee would stand idle and not attempt to collect from appellants long before it did if it were not for the position it had taken with reference to backing the Capital Fireproof Products Corporation. It was therefore error of the trial court to grant appellee's motion.

Appellee is estopped to assert its rights under the bond by reason of its representations and statements upon which Worsham relied in entering into his contract with the Capital Fireproof Products Corporation. The sole reason for Worsham entering into said contract was by reason of said false and fraudulent representations (R. 25, 26, 27-29). The Capital Fireproof Products Corporation acted as the representative and agent of the appellee and payment to it was in effect a payment to the appellee. Appellee is now estopped to recover from appellants. *United States v. American Bonding & Trust Company*, 89 Fed. 921, 925.

II. APPLICATION OF PAYMENTS

The court erred in overruling appellants' motion for judgment as to the sum of \$766.92. The court adopted as its findings the stipulation of facts filed in the cause (R. 21-22). The court treated the sum of \$766.92 as having been applied by the appellee to the account of the Capital Fireproof Products Cor-

poration for materials delivered for use at Manassas and West Point, Virginia. The stipulation of facts (R. 34) shows that a different type of notation was placed opposite the items of \$350.00 and \$500.00 by the bookkeeping department some time between the 20th of September 1932 and the 7th of December 1932, and probably nearer the 7th of December 1932. The first of these payments was received July 25, 1932, and the second payment received September 13, 1932, and both payments were applied to the open account. Thereafter it probably became the intention of the appellee to apply these payments against materials furnished for use at Manassas and West Point, Virginia, but no actual application was ever made. The appellants are entitled in accordance with a well established rule of law to have these payments applied to the debt having priority in time, since all items were equally secured. The Supreme Court of the United States in case of *United States v. Kirkpatrick, et al.*, 9 Wheat. 720, 6 L. ed. 717, 733, said:

“In cases like the present, of long and running accounts, where debits and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time; so that the credits are to be deemed payments pro tanto of the debts antecedently due.”

This rule and principle has been followed ever since with few exceptions.

In the case of *Columbia Digger Co. v. Rector*, 215 Fed. 618, the plaintiff was a subcontractor of the defendant, the general contractor on a public work, the general contractor having given the usual bond for the protection of labor and materialmen. The

general contractor had made payments to the subcontractor specifying the account to which they were to be applied. The subcontractor sought to apply these payments to another account, but the court said:

“Rector and Daly had a right to make application of this payment and, in the manner indicated, had done so. This operated instantaneously to discharge the liability of the sureties pro tanto and, while plaintiff and Rector and Daly might thereafter, as between themselves change the application of such payment, it would not operate to revive the extinguished obligation of the defendants.”

This principle is followed by the court in *United States Fidelity & Guaranty Company v. Eichel*, 219 Fed. 803. It was attempted in that case to apply payments two years after received against an account which had been incurred subsequent to the original account and for which the payments were made. The rights of the parties had changed, one of the parties having become a bankrupt. Here again the court said:

“The general rule on this subject is well known. The debtor who is paying his own money, may apply it to whichever of his debts he may select. If the debtor makes no selection, the creditor has the right of application. If neither acts at the time of payment, the law applies the money to the oldest debt. Special equities may require special treatment, but the general rule requires the application just stated. * * * But, aside from this, the Stone Company had no right to make a *nun pro tunc* application two years after the payments had been made, and several months after the principal debtor had gone into bankruptcy. The rights of creditors against

the estate had been fixed and the Stone Company could not change them.”

In the matter of *The Sophia Johnson*, 237 Fed. 406, the question of application of payments was again involved. The libelant had furnished oil for commercial as well as consumption purposes to the vessel. Payments received were placed in an open running account. An action was brought for the balance due and the libelant sought to have the payments received by him charged to the items representing oil furnished for commercial purposes in order that he might obtain a lien on the vessel for oil furnished for consumption purposes, but the court said:

“The payments made were applied to the general account and that included some items for which a lien is now asserted, and after the application of the payment by the creditor, it cannot be altered by him except by mutual consent. And where application is made at the time of payment no change in appropriation can afterwards be made so as to affect the equities of third parties.”

The question is then presented as to what shall be done in case neither of the parties make an application prior to the filing of an action, and this question is discussed in *Re American Paper Co.*, 255 Fed. 121. If neither party makes an application prior to the instigation of the suit, then they cannot thereafter make the application, but the court is to make the application. It is there stated:

“When a payment, insufficient to satisfy two or more debts, is made, and neither the debtor nor creditor makes an appropriation of payment, it is too late for either to make an appropriation after controversy has arisen thereover or litigation has been instituted. It is the duty of the

court in such cases to make the appropriation in accordance with equitable principles. When the security is the same, the state and federal rule is to apply the payment first to the oldest obligation. When the security is not the same, the rule is to apply the payment first to the obligation least secured, or whose security is most precarious.”

The same principle is followed in the matter of *Bacon v. Dollar S.S. Lines, Limited*, 290 Fed. 964, and these principles are also followed in the matters of *West Ky. Coal Company v. Dillon*, 15 Fed. (2d) 25 and *Delaware Dredging Co. et al. v. Tucker Stevedoring Co.*, 25 F. (2d) 44.

It will be noted that the general contractor who gives a public bond required under the Heard Act is in substantial effect a surety for the payment of every liability for labor and materials incurred by his subcontractors in the work. Here the appellant Worsham occupies the relation of surety for the payment to the Bethlehem Steel Company for the materials purchased by the Capital Fireproof Products Corporation. In the same manner the general contractor for the Manassas and West Point, Virginia, post-office buildings was in effect a surety for the payment to the Bethlehem Steel Company for the materials purchased by the Capital Fireproof Products Corporation and used in those jobs.

The above authorities establish the fact that where the security for the debt is the same and the rights of the surety are involved then the payment must be applied to the oldest account unless an application has been made by first the debtor, or secondly, the creditor, and such application made prior to the institution of an action. In this case the debtor has made no application, the creditor has made no application, the security for the debts are the same, the

rights of the surety are affected and accordingly the payments of \$350.00 and \$500.00 must be applied to the oldest debt or the debt having priority in time.

It is submitted that the judgment of the Court below should be reversed.

Respectfully,

BYNUM E. HINTON,

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Attorneys for Appellants.

FILED JAN 8 - 1936

Heavly 11/10/36

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No. 6569

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v.

BETHLEHEM STEEL COMPANY, A Corporation,
Intervener, *Appellee.*

BRIEF ON BEHALF OF APPELLEE

RICHARD H. WILMER,
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COMPANY, A Corporation, *Appellants*

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BETHLEHEM STEEL COMPANY, A Corporation,
Intervener, *Appellee*.

BRIEF ON BEHALF OF APPELLEE

STATEMENT OF FACTS

Inasmuch as the appellants in their brief have stated some of the facts argumentatively, the appellee finds it incumbent to restate the facts.

The appellant Earl S. Worsham, trading as Worsham Brothers, entered into a contract on the 30th day of June, 1931, with the United States for the construction of certain public buildings at the Naval Air Station, Washington, District of Columbia (R. 2). As

required by the Heard Act (Title 40, U. S. C. A. 270), Worsham Brothers gave the usual bond conditioned for the faithful performance of the contract and for the prompt payment to all persons supplying labor and material in the prosecution of the work (R. 2 and 3). The appellant United States Guarantee Company is the surety on that bond (R. 2 and 3).

Thereafter, Worsham Brothers in order to carry out its aforesaid contract with the United States, entered into a contract with Capital Fireproof Products Corporation for the supplying by the latter of fabricated reinforcing steel to it for use in said construction (R. 3 and 20). Certain negotiations were had between Earl S. Worsham and the representative of the Capital Fireproof Products Corporation looking to the consummation of this contract. At a conference held before the contract was given by Worsham to Capital Fireproof Products Corporation, a salesman of Bethlehem Steel Company was present, together with Worsham and one Thompson, who represented Capital Fireproof Products Corporation (R. 20). Bethlehem Steel Company supplied steel to Capital Fireproof Products Corporation for use in the construction of the Naval Air Station job and failed to receive full payment from Capital Fireproof Products Corporation and made demand under the bond on appellants, Worsham and his surety, on or about May 1, 1932. Failing to receive payment, Bethlehem intervened in the proceedings below and was awarded judgment in the amount of \$4,017, representing the unpaid balance on account of material going into the construction of the aforesaid buildings at the Naval Air Station. Interest from the date of demand, May 1, 1932, was allowed (R. 17).

To the intervening petition of Bethlehem Steel Company the defendants interposed two pleas, a plea

of equitable estoppel and a law plea of partial payment (R. 11, 12, 14 and 15).

Facts with Respect to Equitable Plea

The facts with respect to the equitable issue raised by said plea of equitable estoppel are: At the afore-said conferences between Earl S. Worsham and the representative of Capital Fireproof Products Corporation certain statements were made by a salesman for Bethlehem Steel Company. The purport, effect and substance of these statements are controverted by the parties. The Court found the facts with respect to said statements (R. 20) as follows:

“Said salesman stated in effect to Worsham that if Capital Fireproof Products Corporation was given the contract by Worsham for the supplying of the fabricated reinforcing steel Bethlehem Steel Company would supply the necessary raw steel to Capital Fireproof Products Corporation for use by it in fulfilling such contract with Worsham. The contract for delivery of the reinforcing steel was made by Worsham with Capital Fireproof Products Corporation. The steel was delivered to Capital Fireproof Products Corporation by Bethlehem Steel Company and by Capital Fireproof Products Corporation fabricated and delivered to the job in complete conformity with the contract between Worsham and Capital Fireproof Products Corporation. No representation was made by the salesman for Bethlehem Steel Company that Bethlehem Steel Company was back of Capital Fireproof Products Corporation, that the latter corporation was a subsidiary of Bethlehem Steel Company or that Bethlehem Steel Company backed Capital Fireproof Products Corporation either financially or in its ability to perform the contract. The cost of the raw material to be fabricated constituted from 60% to 70% of the total price under Worsham's con-

tract with Capital Fireproof Products Corporation for the supplying of the reinforcing steel on the job. Capital Fireproof Products Corporation had never done business before with Worsham. The use of fabricated steel by Worsham came at a time early in the performance of his principal contract with the Government. The statements made by the salesman for Bethlehem Steel Company at most went only to the proposition that if the contract were given to Capital Fireproof Products Corporation by Worsham the former could obtain the necessary material from Bethlehem Steel Company for fabrication under its contract with Worsham."

In the examination of Earl S. Worsham as a witness on behalf of the appellants, the following question was propounded to the witness: "Had any notice been given to you on behalf of the Bethlehem?" The witness answered: "It had not." (R. 26). Objection was interposed to this question and answer by the attorney for the appellee, which objection was sustained. Appellants' counsel urged that relying on the Bethlehem Steel Company's alleged representations appellant Worsham paid Capital Fireproof Products Corporation and did not protect himself as he would have done had it not been for the alleged representations of the Bethlehem Steel Company (R. 26).

Facts with Respect to the Law Issue

By the law plea the appellants below raised a defense of partial payment to the extent of \$766.92 (R. 11, 12, 14 and 15). Bethlehem Steel Company made sales of materials to the Capital Fireproof Products Corporation in the amount of \$5,561.38 for use in the construction of the buildings at the Naval Air Station (R. 30). In addition to these materials Bethlehem Steel Company sold to Capital Fireproof Products

Corporation material for use by the latter in the construction of two post offices at Manassas, Virginia, and at West Point, Virginia, totalling \$766.92 (R. 30). In the construction of these two post offices the usual public bonds were given by the contractor, Algernon Blair, with the same company, United States Guarantee Company, appellant here, as surety thereon (R. 30). In order that the Court may see at a glance the relative position in point of time of the charges and payments (R. 30, 31 and 32), the following table, chronologically arranged as to dates of charges and payments, respectively, is presented:

Charges		Payments	
Aug. 25, 1931...	68,810 lbs. \$1,161.74	Nov. 3, 1931 (Credit) ..	\$ 28.64
Aug. 25, 1931...	40,220 lbs. 617.47	Feb. 6, 1932.....	617.47
Sept. 12, 1931...	49,990 lbs. 810.46	Apr. 9, 1932.....	250.00
		Apr. 23, 1932.....	265.19
	\$2,589.67*	July 25, 1932.....	350.00
Sept. 17, 1931, materials used in the construction of post office buildings at Manassas and West Point, Va.	766.92	Sept. 13, 1932.....	500.00
Sept. 30, 1931...	39,140 lbs. 637.61	Dec. 12, 1932.....	100.00
Oct. 7, 1931....	44,960 lbs. 730.09	Jan. 5, 1934.....	200.00
Oct. 9, 1931....	95,390 lbs. 1,604.01		
		TOTAL.....	\$2,311.30

*Balance due at time of purchase of Virginia post office materials and erroneously totalled as \$2,699.67 by the appellants in their brief (p. 3).

Referring to the payments listed above, the first item of \$28.64 was a credit on account of materials returned (R. 30). The next payment of February 6, 1932, in the amount of \$617.47 paid the invoice of August 25, 1931, in the amount of \$617.47 (R. 31). The payments of \$250.00 and \$265.19 on April 9 and April 23, 1932, respectively (R. 31), were paid on account of materials going into the Naval Air Station construction and are not in controversy. The application of the payments of \$350.00 and \$500.00 made, respectively, on July 25, 1932, and September

13, 1932 (R. 32), are in controversy and the stipulation of facts with respect thereto is as follows (R. 34):

“That if called, the proper official of Bethlehem Steel Company would testify as follows: That with respect to the payments of \$350 made on or about July 26, 1932 and \$500 made on or about September 20, 1932, these payments were received by Bethlehem but inasmuch as they were not in payment of a specific invoice or a specific amount, they were merely run into the Capital Fireproof Products account; that after receipt of the payments the question as to the rights of Bethlehem under the three bonds; i.e., public bond on the Manassas, Virginia, post office, the public bond on the West Point, Virginia, post office and the public bond on account of the Naval Air Station job, was considered by Bethlehem. It was concluded that inasmuch as no designation was made as to the application of these two payments by Capital Fireproof Products, they would be applied to the payment of the amount of \$766.92, this amount covering the materials supplied on account of the two Virginia post office jobs; that thereupon a check mark was placed on the ledger beside the debit item. This was a different type of notation than is usually made by the bookkeeping department. Generally when an invoice is listed as a debit on the account, it is given a number and then when a payment comes in in payment of that particular item, it is likewise numbered with the same number. The amount of \$850 was applied against the amount of \$766.92 by Bethlehem some time between September 20, 1932 and December 7, 1932, and probably near December 7, 1932.”

QUESTIONS INVOLVED

Equitable Issue

1. Did the Court below commit substantial error in sustaining the objection to the following question put to and the answer thereto of Earl S. Worsham:

“Had any notice been given to you on behalf of the Bethlehem?” Answer: “It had not.”

2. With respect to the substance of the equitable plea (a) is there sufficient evidence to justify the Court's finding that no false or fraudulent representations were made by the salesman of Bethlehem Steel Company, and (b) assuming all of the testimony on behalf of the appellants to be true, is there sufficient to make out a case of equitable estoppel?

Law Issue

3. Under the facts, (a) did Bethlehem Steel Company properly apply the two payments of \$350.00 and \$500.00 against the amount of \$766.92, representing the charge for materials supplied by it for use in the construction of the two Virginia post offices, or (b) was it entitled to have the same applied by the Court?

ARGUMENT

I. Estoppel

A. The finding of the Court below that there were no false or fraudulent representations is sustained by the evidence and the Court did not commit error in sustaining the objections to the question propounded to the witness, Earl S. Worsham, and his answer thereto.

The appellants' argument that the Court erred in overruling the motion for judgment on the equitable plea proceeds solely on the assumption that there were false and fraudulent representations made by the salesman of Bethlehem Steel Company. The Court specifically found that there were no such false and fraudulent representations made (R. 20 and 21), finding:

"No representation was made by the salesman for Bethlehem Steel Company that Bethlehem Steel Company was back of Capital Fireproof Products Corporation, that the latter corporation was a subsidiary of Bethlehem Steel Company or that Bethlehem Steel Company backed Capital Fireproof Products Corporation either financially or in its ability to perform the contract. * * *"

This finding is amply borne out by the testimony of Thompson (R. 27 and 28) and the salesman, Coster (R. 28 and 29), which testimony in some respects is in conflict with the testimony of Worsham (R. 24, 25, 26 and 27). That the finding of the trial court before whom the witnesses appeared is followed by the court on appeal if there is evidence upon which the findings are supported is axiomatic. *Lipski v. Burch, et al.*, 63 App. D. C. 104, 69 F. (2d) 842, citing *Butte & Superior Copper Co. v. Clark-Montana Realty Co.*, 249 U. S. 12, 39 S. Ct. 231, and *United Shoe Mach. Corp. v. United States*, 258 U. S. 451, 42 S. Ct. 363. As said by this Court in *Matson v. Rusch*, 61 App. D. C. 184, 59 F. (2d) 360:

"* * * it is settled law that, where an equity cause is tried in open court with a full opportunity on the part of the trial justice to observe the demeanor of witnesses and to judge

of their veracity, his findings on questions of fact have much the same sanctity as the verdict of a jury, and they will not be disturbed on appeal, unless a mistake of judgment is so apparent as to demand a reversal."

The findings will not be disturbed unless manifestly wrong. *Williams v. Foster, et al.*, 62 App. D. C. 14, 63 F. (2d) 893 (citing several cases from this Court).

The record does not bear out the assertion of the appellants in their brief (p. 6) that the sole reason for Worsham having entered into the contract with Capital Fireproof Products Corporation was the false representations of the salesman. The findings of the Court and the testimony clearly show that the statements of the salesman only went to the proposition that if the contract were given to Capital Fireproof Products Corporation the latter would have no difficulty in the timely obtaining of the steel for the job (R. 21). This would naturally be important to Worsham inasmuch as the fabricated steel was one of the first products necessary to go into the construction work, and delay on the part of Capital Fireproof Products Corporation in getting the steel for fabrication would have held up the performance by Worsham of his contract. The contract was fully and promptly performed by Capital Fireproof Products Corporation (R. 20), and the only difficulty arises by reason of the payment by Worsham to Capital Fireproof Products Corporation without ascertaining if the materials supplied by it had been paid for—a business mistake not attributable to Bethlehem Steel Company.

The case of *United States v. American Bonding and Trust Company*, 89 Fed. 921, relied on by ap-

pellants, is not applicable. In that case false material representations were found by the court to have been actually made to the surety, not the contractor, which representations induced the suretyship relation. In the instant case the Court has conclusively found that no false representations were made.

With respect to the excluded question and answer, the appellants contend in their brief (pp. 5 and 6) that, if the question objected to and the answer given had been permitted to stand,

“they would then have been in a position to argue that the failure to give notice supported the statements and representations made by the appellee to the effect that it backed Capital Fireproof Products Corporation financially, as well as in its ability to do the work.”

Counsel stated their position in support of the admissibility of the question and answer in a different fashion before the Court below, for the record shows (R. 26) that it was first

“argued that relying on the Bethlehem Steel Company’s alleged representations defendant paid the Capital Fireproof Products Corporation and did not protect themselves as they would have done had it not been for the alleged representations of the Bethlehem Steel Company.”

If the appellants still maintain their argument made in the Court below that the question and answer should have been admitted as being based upon the alleged misrepresentations of Bethlehem Steel Company’s salesman, the argument collapses, for, as stated above, the Court found that no such misrepresentations were made. If, on the other hand,

the appellants now rely on the argument that the question and answer should have been admitted as showing that the misrepresentations were actually made, we can only say that any such argument is too far-fetched to require any extended discussion. It is contended by appellants in their brief (p. 6) that "it is not to be believed that the appellee would stand idle and not attempt to collect from appellants long before it did if it were not for the position it had taken with reference to backing the Capital Fireproof Products Corporation." This is a tenuous argument, indeed. Capital Fireproof Products Corporation was the primary debtor to Bethlehem Steel Company, and we fail to see how a delay in attempting to collect from the appellants is in any way indicative that Bethlehem Steel Company's salesman made the representations alleged by the appellants. The difficulty of appellants is that, notwithstanding the affirmative obligation under the bond and under the law, Worsham took a chance and paid Capital Fireproof Products Corporation without first taking the reasonable precaution to ascertain whether the materialman, Bethlehem Steel Company, had been paid.

B. Appellants did not make out a case of equitable estoppel.

The Court's attention is respectfully invited to the testimony of the witness Worsham, which is the only evidence on behalf of the appellants going to the alleged misrepresentations. This evidence is set forth on pages 25, 26 and 27 of the record. The testimony relied on to constitute an estoppel is, at best, most ambiguous and unconvincing. The strongest testimony consists of such statements by the witness Worsham as "And he [the salesman] led me to be-

lieve that I was dealing with the Bethlehem Steel Company'' (R. 25) and ''[the salesman said] The Bethlehem Steel Company is behind this, and I can assure you we will make delivery'' (R. 26). It is respectfully submitted that this is very unsatisfactory evidence, indeed, upon which to predicate an equitable estoppel. This evidence falls short of the allegations in the plea itself. The Court below under the evidence could not have done otherwise than to give judgment for the appellee on the equitable plea. The pleading and proof of estoppel must be clear, satisfactory and unambiguous. *Belle of the Sea*, 20 Wall. 421, 429-430; *Victor Talking Machine Co. v. American Graphophone Co.*, 189 Fed. 359, 380.

While, therefore, the record does not sustain the appellants in their contention of error, it is well, nevertheless, to point out that even assuming the alleged representations to have been made and to have been false, a plea of equitable estoppel was not sustained for the following, among other, reasons:

1. No authority was shown in the salesman to make the alleged representations.

In order to prove the equitable estoppel alleged in the pleas of appellants (R. 11, 12, 14 and 15), it was necessary for the appellants to prove that the Bethlehem Steel Company had represented that Capital Fireproof Products Corporation was its subsidiary and was backed by Bethlehem Steel Company both financially and in its ability to execute the work.

With respect to representations in general, the court in *Art Metal Works, Inc. v. Abraham & Straus, Inc.*, 4 F. Supp. 298, at p. 302, said:

''Efforts of salesmen to sell their merchandise and earn commissions on their sales not infrequently result in overstatements. But in the

matter of bad faith the principal should not be bound by unauthorized representations; * * *

2. All of the essential elements of an estoppel were neither alleged nor proved at the trial below. It was not proved that the appellant Worsham was without knowledge or without equal means of acquiring knowledge of the matters alleged in estoppel, and there can be no estoppel if any of the elements of estoppel are wanting. *Central Improvement Company v. Cambria Steel Co.*, 210 Fed. 696, 718; *New York Life Ins. Co. v. Silverstein*, 53 F. (2d) 986.

II. Application of Payment

The Court below properly found for the appellee on the law issue as to the application of the payments of \$350 and \$500 to the item of \$766.92 covering materials which went into the construction of the two Virginia post offices.

The appellants in their brief (pp. 6 and 7) proceed on the assumption that the Court below "treated the sum of \$766.92 as having been applied by the appellee to the account of the Capital Fireproof Products Corporation for materials delivered for use at Manassas and West Point, Virginia." The Court below in adopting the stipulation of facts of the parties concludes (R. 22) "that the Bethlehem Steel Company is entitled to a judgment in effect treating the payment of \$766.92 made by Capital Fireproof Products Corporation to it as a payment on account of materials supplied by Bethlehem Steel Company to Capital Fireproof Products Corporation for use in the construction of the post offices at Manassas and West Point, Virginia."

The question, therefore, is open to this Court to determine, first, whether an application was made by the

parties, and, if not, second, whether the payments should be applied by the Court against the \$766.92 item on account of materials going into the Virginia post offices.

The pertinent stipulation of facts (R. 34) is set forth above (p. 6). These facts disclose that the debtor made no designation of application, that Bethlehem upon receipt of the two payments of \$350 and \$500, in controversy, merely ran them into the account, that after their receipt, and some time between September 20, 1932, and December 7, 1932, and probably near December 7, 1932, it was concluded, after a consideration of the rights of Bethlehem under the three public bonds on the three construction contracts at Manassas, Virginia, at West Point, Virginia, and at the Naval Air Station in the District of Columbia, to apply these payments against the amount of \$766.92. This was done by Bethlehem, and a check mark was placed on the ledger beside the debit item, being a different ledger designation than usually employed by the bookkeeping department.

The general rule is that in the absence of a designation of the application of a payment by the debtor, the creditor may apply the payment to any subsisting debt. See *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. Ed. 199, wherein it is said:

“The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments, according to its own notions of justice.”

It further has been held that merely running the payment into an account is not an application by the parties. *Delaware Dredging Co. v. Tucker Stevedoring Co.*, 25 F. (2d) 44, wherein it is said:

“The canal company [the debtor] did not request

that these payments be applied to any specific account, and so the Tucker Company [the creditor] simply gave the canal company credit on its open running account. * * * We think the District Court was right in holding that no application was made by either debtor or creditor.”

In *Wait v. Homestead Bldg. Association*, 81 W. Va. 702, 95 S. E. 203, it is said by the court:

“ * * * it is assumed as in argument that each of the two items composing that amount was entered on the books [by the creditor] merely as a credit on Fischer’s indebtedness. This, we think, does not conclusively show an appropriation such as binds any party interested in the transaction, * * ”

The general rule being that the creditor may make application of the payment, where the debtor makes no designation, this application may be made within a reasonable time after receipt of payment. As said in 21 R. C. L. 92, § 96:

“Undoubtedly the rule that he [the creditor] must make the appropriation within a reasonable time thereafter meets the approval of most courts. * * ”

Since, according to the testimony (R. 34), application was made some time between September and December of 1932, it is submitted that the application by the creditor, Bethlehem, was made within a reasonable time, the two payments having been made to Bethlehem Steel Company on July 25, 1932 (R. 31), and September 20, 1932 (R. 34), respectively. The circumstances of the parties did not change between receipt of payment and the date of application by Bethlehem. The judgment for Bethlehem should, therefore, be sustained on the ground that there was a proper application by Bethlehem Steel Company.

If proper application is not considered by the Court

to have been made by Bethlehem as the creditor, then the judgment below, nevertheless, can be properly sustained on the ground that Bethlehem as the creditor is entitled to have the payment credited by the Court against the \$766.92 item. It is settled that if the parties did not apply the payment the court itself shall do so according to equitable principles. In *Field v. Holland*, 6 Cranch 8, 3 L. Ed. 136, the Court said with respect to the matter of application of payments:

“If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. * * *”

It is further settled that while one of the equitable principles to be followed by the court in making the application is that the payment should be applied to the oldest item, nevertheless, the court will first apply the payment to the debt for which the security is most precarious. As said by the Supreme Court in *Field v. Holland*, *supra*:

“It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious. That course has been pursued in the present case.”

And as said by the court in *Bacon v. Dollar S. S. Lines*, 290 Fed. 964:

“When the security is the same, the state and federal rule is to apply the payment first to the oldest obligation. When the security is not the same, the rule is to apply the payment first to the obligation least secured, or whose security is most precarious. In *re Kemp* (D. C.) 255 Fed. 125, at page 128, and cases cited.”

See, also, *In re American Paper Co.*, 255 Fed. 121, cited by appellants at pages 9 and 10 of their brief, and quotation therein set forth.

In the instant case, the general contractor on the Manassas and West Point, Virginia, post office constructions, was Algernon Blair, who gave the usual performance bonds with the appellant United States Guarantee Company as surety thereon. The Court will take judicial notice of the fact that under the Heard Act (40 U. S. C. A. 270) any suit on each of said bonds must have been instituted in the jurisdiction of the Federal District Court wherein the contract was to be performed and executed, and not elsewhere. A separate suit on each bond would have been required, with the attendant expense of filing separate suit, publishing notice, etc., as required by the law. The \$766.92 item was least secured and more precarious than the items secured by the Worsham bond, where a larger amount was involved and intervention in a subsisting suit was all that was necessary to recover under that bond. Under these circumstances, therefore, the decision of the Court below can properly be sustained on the equitable doctrine of applying the payment to the least secured item.

The cases cited by the appellants and, indeed, the position taken on the law in their brief are not in conflict with the rules of law contended for herein with respect to application by the Court. The appellants assume that the security on all the debts was the same. We submit that this assumption is not correct and that the security of the item of \$766.92 was most precarious. If the Court determines that application was not properly made by Bethlehem Steel Company itself, then the application by the Court turns on the question of whether or not the item of \$766.92 was unsecured or precarious within the meaning of the rule laid down by the Court in the case of *Field v. Holland*, *supra*.

It is submitted that the decision of the Court below

in awarding judgment to Bethlehem Steel Company in the amount of \$766.92 is sustainable on either of two grounds, first, that application was properly made by Bethlehem Steel Company itself, or, second, that the law should apply the payment to the \$766.92 item, inasmuch as it is the least secured.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed in its entirety.

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